JUN 11 1951

CHARLES ELMORE CROPLEY
CLERK

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM 1950

No. 114

WABASH CORPORATION and HARTFORD NATIONAL BANK & TRUST COMPANY (Trustee),
Petitioners,

v.

ROSS ELECTRIC CORPORATION and GENERAL ELECTRIC COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THEODORE S. KENYON,
ARTHUR G. CONNOLLY,
Counsel for Petitioners

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, WABASH CORPORATION and HARTFORD NATIONAL BANK & TRUST COMPANY, respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on February 21, 1951 (Petition for Rehearing denied March 15, 1951).

Ten copies of the record, one of which is certified, printed as a joint appendix to the briefs for use in the court below, together with the proceedings and opinions in that court are furnished herewith in accordance with Rule 38 of the rules of this Court. In addition, ten copies of a stipulated Exhibit Book and specimens of the devices in issue have been filed with the clerk.

Opinions Below

The opinion of the District Court (R. 6-30) is reported in 81 F. Supp. 511 (E. D. N. Y., 1948). The opinion of the Court of Appeals (R. 215-274) is reported in 187 F. 2d 277.

Jurisdiction

The judgment of the Court of Appeals was entered February 21, 1951. The order denying a timely Petition for Rehearing filed March 8, 1951 was entered on March 15, 1951 (R. 280). The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1254(1) and 2101(c).

Question Presented

The sole question presented is whether it is contrary to patent law and paramount public interest to strike down—for asserted lack of invention—a patent for an ingenious new product, nowhere disclosed or suggested in the prior art, that has—

> (a) literally created an important and fast-growing new business,
>
> (b) forced the most powerful competitor to copy the patented product and abandon the cumbersome and inferior prior art device, with which that competitor had earlier dominated the market, and
>
> (c) provided the public with a cheap and efficient device that has not only satisfied an old and recognized want but opened up extensive new fields of popular utility.

The question is of immediate importance to forestall destruction of confidence in the patent laws as an effective instrument for promoting competition and the useful arts by encouraging and protecting new enterprises built on ingenuity and merit. An affirmative application of the con-

stitutional standard of invention is sorely needed to check the apparently growing feeling on the part of the lower courts that none but the most extraordinary inventions can meet that standard.

Summary and Short Statement of the Matter Involved

The patent in suit is for the now familiar photoflash lamp characterized by a filling of gossamer fluff made of almost invisibly fine wire supported elastically within the bulb by the curls and loops of wire touching the glass.[1]

The District Court (Judge Galston) held the Korver product patent in suit No. 2,162,847 valid over the prior art and infringed as to all three claims by the photoflash lamps manufactured by the respondent General Electric Company and sold by that company and by respondent Ross Electric Corporation.[2]

The Court of Appeals, Judge Chase dissenting, reversed on the question of validity.

The facts are fully set forth in the opinion of Judge Chase (R. 217-235), who confirmed the findings of fact of the District Court and concluded therefrom that the decision of the District Court should be affirmed. Judges A. N. Hand and Frank accepted all of the facts as stated by Judge Chase (R. 216, 236) but decided that the patent was invalid for lack of invention. The only difference between the

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[1] Specimens of petitioner's patented photoflash lamps (Pltfs' Ex. 4) and the General Electric Company's accused lamps (Pltfs' Ex. 25) have been supplied to the clerk for distribution to the justices. These specimens, when held between the eye and the window, show better than any photograph the character of the filling material in question.

[2] A second Korver patent No. 2,113,423 directed to an automatic method for manufacturing photoflash lamps was held by the District Court to be valid but not infringed. The Petition at bar is not concerned with this patent.

judges is one of law—in applying a different "standard of invention" to the same set of facts.

The only commercial photoflash lamp known prior to the invention in suit was the now obsolete aluminum foil lamp made under Ostermeier patent No. 1,776,637 and sold by the respondent General Electric Company between 1930 and the early 1940's (R. 32).[3] In 1937 petitioner's predecessor commenced the manufacture of the new photoflash lamp filled with skeleton-like gossamer wire fluff, as illustrated and described in the Korver patents (then pending as applications) under which it had acquired an exclusive license (R. 32-33). It was a complete newcomer in this field, yet within one year its sales of photoflash lamps, built in exact accordance with the disclosure of the Korver product patent at bar, exceeded the sales of the aluminum foil lamps made by the General Electric Company (R. 28). By 1941 the sales of Wabash lamps had risen to about 17 million per annum, more than four times the maximum sales of the General Electric foil lamps (R. 33). About 1940 the General Electric Company commenced the manufacture of its infringing wire lamps (R. 28). Within a year its sales of those lamps far exceeded its sales of the aluminum foil lamps and the latter were shortly abandoned (R. 28). Since the War petitioner's sales of its patented lamps and the respondents' sales of the infringing lamps have increased rapidly so that by the time of the trial in 1948 the petitioner's sales amounted to over 70 million lamps annually and the respondents' sales to nearly 60 million lamps annually (see Sales Chart, Petitioners' Ex. 28-13 annexed to this Petition).

In his statement of facts, accepted by the other Circuit Judges, Judge Chase said (R. 232-3):

> "Korver was the first to create a flash lamp with a filler uniformly distributed and held in place within

[3] The Ostermeier patent was held valid and infringed in *General Electric Company* v. *Munder Electrical Company et al.* (D. Mass. 1938), 22 F. Supp. 291.

> the bulb so that the output of actinic light was more easily coordinated with the camera and more useful for photographic purposes."

and at R. 231:

> "As the trial court found from ample evidence:
>
> > 'The lamps manufactured by Wabash embodying the Korver patented product are cheaper, smaller, more uniform and more efficient than any photoflash lamps previously made. They have a light curve which differs from that of the foil lamp in having a lower, broader peak, more like a plateau, so that the difficult problem of synchronization with the camera shutter is largely avoided.'
>
> The only lamp which, before the patented lamp, was commercially successful was the foil filled one of Ostermeier, which the Korver lamp pushed off the market."

and at R. 233:

> "It was shown that when the defendant's Ostermeier flash lamp was unable to meet successfully the competition of the patented lamp, the defendant cast about for something that would, and eventually turned up the accused lamps which, being able to do so, have been sold over the succeeding years in about the same quantity as the patented ones."

And finally at R. 235:

> "In every particular referred to in the claims, the structure of the accused lamps is the same as or the substantial equivalent of that described and claimed in the Korver product patent."

Thus by the use of the patented invention a small company, which had never been in the business before (R. 39-40), created a great industry and by the sheer merit of its patented product forced the entrenched and established competitor to abandon its earlier product and to copy the plaintiffs' product.

The only basis given in the opinion of the court below for the conclusion that the product patent is invalid is in the following sentences, per Judge Hand (R. 216):

> "Judge Frank and I have been unable to discover any patentable invention in the plaintiffs' product. The Ostermeier, vanLiempt and Crowley patents taught the art enough to defeat the claims of the product patent relied on. In the first, a metallic foil was used; in the second, a metallic wire; and in the third, metallic wool. The only thing that remained was to fill the entire bulb with the wire for, given that, the filling would normally be undulating, serpentine and elastic."

The failure of these prior patents to teach the invention of the Korver patent with its skeleton-like fluff of fine wire elastically supported from the walls of the bulb in uniform spacial distribution is shown in Judge Chase' opinion (R. 231-3) and Judge Galston's opinion and findings of fact (R. 20-23 and 36), the latter being based upon testimony developed at the trial, documents and physical exhibits introduced and explained at the trial, and demonstrations conducted at the trial.

Specification of Errors

The Court of Appeals erred in finding no patentable invention in the product patent in suit and in failing to find it valid.

Reasons for Granting the Writ

1. The Korver photoflash lamp at bar is a classic example of the type of invention or discovery which it is the purpose of the constitutional provision and the patent laws to protect.[4]

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[4] Constitution, Art. 1, sec. 8; 35 U. S. C. 33, R. S. § 4888; 35 U. S. C. 31, R. S. § 4886, 35 U. S. C. 40, R. S. § 4884,—all reprinted in Appendix, pp. 11 and 12.

The patent system is the sword and buckler of little business against big. It is of vital importance to the public that the standard of invention required to support a valid patent be not put beyond reach. If that standard is made so high that only rare genius or the work of highly organized research experts can achieve it, the salutary purpose of the constitutional provision and of the patent statutes will be defeated. *Little business will be at the mercy of powerful competitors.* The incentive to disclose important inventions and to venture capital in their exploitation will be largely destroyed.

The patent at bar exactly fits the pattern that the law is designed to protect. It discloses fully and clearly the new product together with a practical and effective method of making it. Photographers and camera users the country over are daily testifying to its utility. It has met the severe test of invention laid down in the concurring opinion in *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, at p. 155:

> "An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls recognize it as an advance."

Where can one look for greater masters in this scientific field than to the experts of the General Electric Company—whose attention to the problem, at the very time in question, is demonstrated by their contemporaneous patents?[5] Those masters recognized in the hard way the quality and distinction of Korver's advance. They tested and discarded their own best efforts and in the end followed Korver's solution, as held by all the Judges below. More important in the public interest, the invention has literally created a

[5] See Cartun patent No. 2,136,234 and Pipkin patent No. 2,142,372, both applied for in 1937, Petitioners' Exhibit Book pages 14 and 19.

new business of its own completely outstripping the old foil lamp business of the General Electric Company.

To defeat such a patent is contrary to the public interest.

2. The recent decisions of this Court on the standard of invention in patent cases have stampeded the lower courts into requiring a standard so high as to threaten the beneficial purposes of the law.[6] It is time that this Court intervene to clarify the misapprehension in the court below.

The District Judge, after hearing the evidence, wrote an able and painstaking opinion and findings of fact supporting his conclusion that the product patent is valid (R. 19-28, 35-6).

Judge Chase independently wrote a carefully considered opinion affirming that conclusion (R. 229-233).

Judge Hand wrote but eight lines on the subject (R. 216), which we have quoted at page 6 above. He did not find any suggestion in the prior art that would lead to the gossamer skeleton-like mass of thin wire elastically supported from the walls of the lamp in uniform spacial distribution. He referred to the Ostermeier patent (Petitioners' Exhibit Book, page 11), which shows the abandoned foil lamp. He referred to the vanLiempt patent (Peti-

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[6] In one day, April 30, 1951, the Court of Appeals for the Second Circuit handed down three patent decisions, in each case dismissing the complaint and in two of the cases reversing decisions of the district courts that had held the patents valid. See *Killian* v. *Allied Latex Corp.*, F. 2d (89 U. S. P. Q. 212); *Lenox* v. *Landers*, F. 2d (89 U. S. P. Q. 227); and *Youngs Rubber Corp.* v. *Allied Latex Corp.*, F. 2d (89 U. S. P. Q. 223). In his opinion in the last named case, Judge Clark said:

> "Undoubtedly this would have been held invention in times past, but now the climate of opinion has changed. . . ." citing Jungerson *v.* Ostby & Barlow Co., 335 U. S. 560; Sinclair & Carroll Co. *v.* Interchemical Corp., 325 U. S. 327; Great Atlantic & Pacific Tea Co. *v.* Supermarket Equipment Co., 340 U. S. 147; and Crest Specialty *v.* Trager, U. S. (89 U. S. P. Q. 175).

tioners' Ex. Book, p. 44), which shows a "clew" of wire carried by the igniter, which has none of the essential elements of the claims in suit and will not give the same results as the Korver lamp (R. 26-7, 36, 231-2), and which proved a failure (R. 21, 66). He referred to the Crowley British patents (Petitioners' Ex. Book, pp. 33 and 44), which have nothing but a vague description and illustration of some kind of lamp filling with no indication that it is in any way related to the Korver filling. Judge Hand assumed, contrary to the Findings of Fact below,[7] that the invention consisted in merely filling the entire bulb with wire and that if this were done "the filling would normally be undulating, serpentine and elastic." There is no warrant whatever for the assumption that merely filling the entire bulb with wire would give the gossamer skeleton-like fluff elastically supported in uniform spacial distribution from the walls of the bulb, which is the distinctive wire filling of the Korver patent, or that entirely filling the bulb with wire would necessarily mean that "the filling would normally be undulating, serpentine and elastic."

Judge Frank wrote only one line expressing his agreement with Judge Hand (R. 236) and then turned his attention elsewhere.

The case was argued in the Court of Appeals on October 10, 1950 but not decided till February 21, 1951. In the interval, on December 4, 1950, this Court handed down its decision in *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147.

If it be true that Judge Hand or Judge Frank concluded therefrom that patents are now to be sustained only in rare cases of outstanding invention, we submit the Court

---

[7] The District Court found (R. 36):

> "None of the prior patents teaches or discloses the distinctive wire filling of the Korver patent. . . . The Korver product supplied a long-felt want and constituted an ingenious advance over the prior art."

below misapprehended that decision and decided the question at bar in a way that is in conflict with applicable decisions of this Court. See *Expanded Metal Co.* v. *Bradford,* 214 U. S. 366, 387; *Diamond Rubber Co.* v. *Consolidated Tire Co.,* 220 U. S. 428, 434-6; *Eibel Process Co.* v. *Paper Co.,* 261 U. S. 45, 63; *Goodyear Co.* v. *Ray-O-Vac Co.,* 321 U. S. 275, 278.

By reviewing the decision below this Court can clarify the law so that it will be administered by the lower courts to effect the sound economic purposes for which it was designed. Then when ingenuity and venture capital have combined to make available to the public a new product supplying a long-felt want—when they have indeed, as in the present case, erected a great industry where almost nothing existed before—they will receive the patent protection to which they are entitled under the proper constitutional standard. Otherwise, the beneficial effect of the patent laws as a spur to competition will be frustrated by misapprehensions derived by the lower courts from some of the language in the *Supermarket* case.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

THEODORE S. KENYON
Counsel for Petitioner, WABASH CORPORATION.

ARTHUR G. CONNOLLY
Counsel for Petitioner, HARTFORD NATIONAL BANK & TRUST COMPANY.

Dated: June 11, 1951.

Appendix

THE CONSTITUTIONAL PROVISION

ART. 1, sec. 8. The Congress shall have power . . . To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

35 U. S. C. 31; R. S. 4886.

Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor.

35 U. S. C. 33; R. S. 4888.

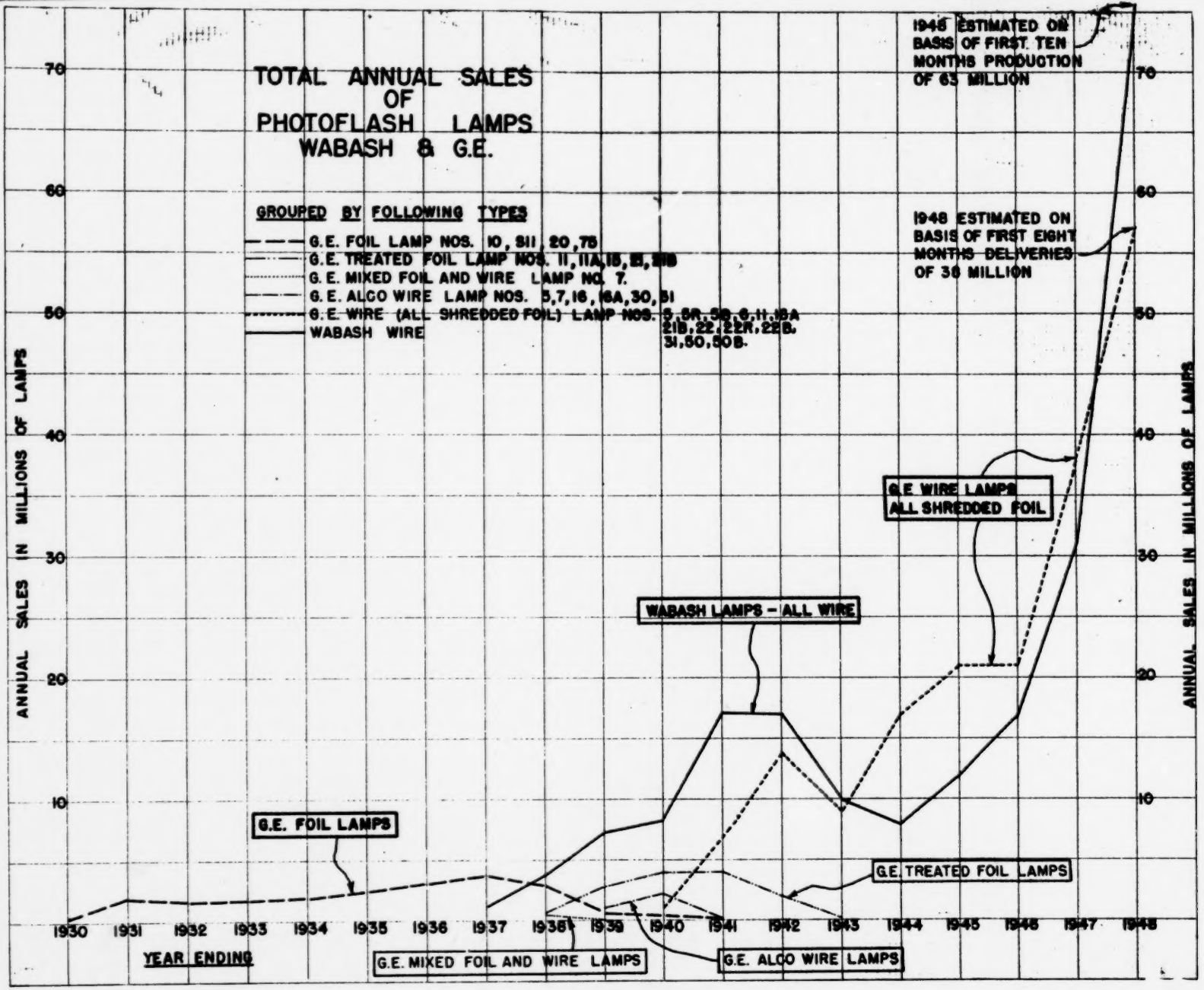
Before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor. No plant

patent shall be declared invalid on the ground of non-compliance with this section if the description is made as complete as is reasonably possible.

35 U. S. C. 40; R. S. 4884.

Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery (including in the case of a plant patent the exclusive right to asexually reproduce the plant) throughout the United States and the Territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

EXH. 28-13


TOTAL ANNUAL SALES
OF
PHOTOFLASH LAMPS
WABASH & G.E.
GROUPED BY FOLLOWING TYPES
G.E. FOIL LAMP NOS. 10, 511, 20, 75
G.E. TREATED FOIL LAMP NOS. 11, 11A, 15, 21, 21B
G. E. MIXED FOIL AND WIRE LAMP NO. 7.
G. E. ALCO WIRE LAMP NOS. 5,7,16, 16A, 30, 31
G.E. WIRE (ALL SHREDDED FOIL) LAMP NOS. 9, 9R, 9B, 6, 11, 18A 21B, 22, 22R, 22B. 31, 50, 50B.
WABASH WIRE
1948 ESTIMATED ON BASIS OF FIRST TEN MONTHS PRODUCTION OF 63 MILLION
1948 ESTIMATED ON BASIS OF FIRST EIGHT MONTHS DELIVERIES OF 38 MILLION
G.E WIRE LAMPS ALL SHREDDED FOIL
WABASH LAMPS - ALL WIRE
G.E. FOIL LAMPS
G.E. TREATED FOIL LAMPS
G.E. MIXED FOIL AND WIRE LAMPS
G.E. ALCO WIRE LAMPS
ANNUAL SALES IN MILLIONS OF LAMPS
ANNUAL SALES IN MILLIONS OF LAMPS
0
10
20
30
40
50
60
70
1930
1931
1932
1933
1934
1935
1936
1937
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1939
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1947
1948
YEAR ENDING

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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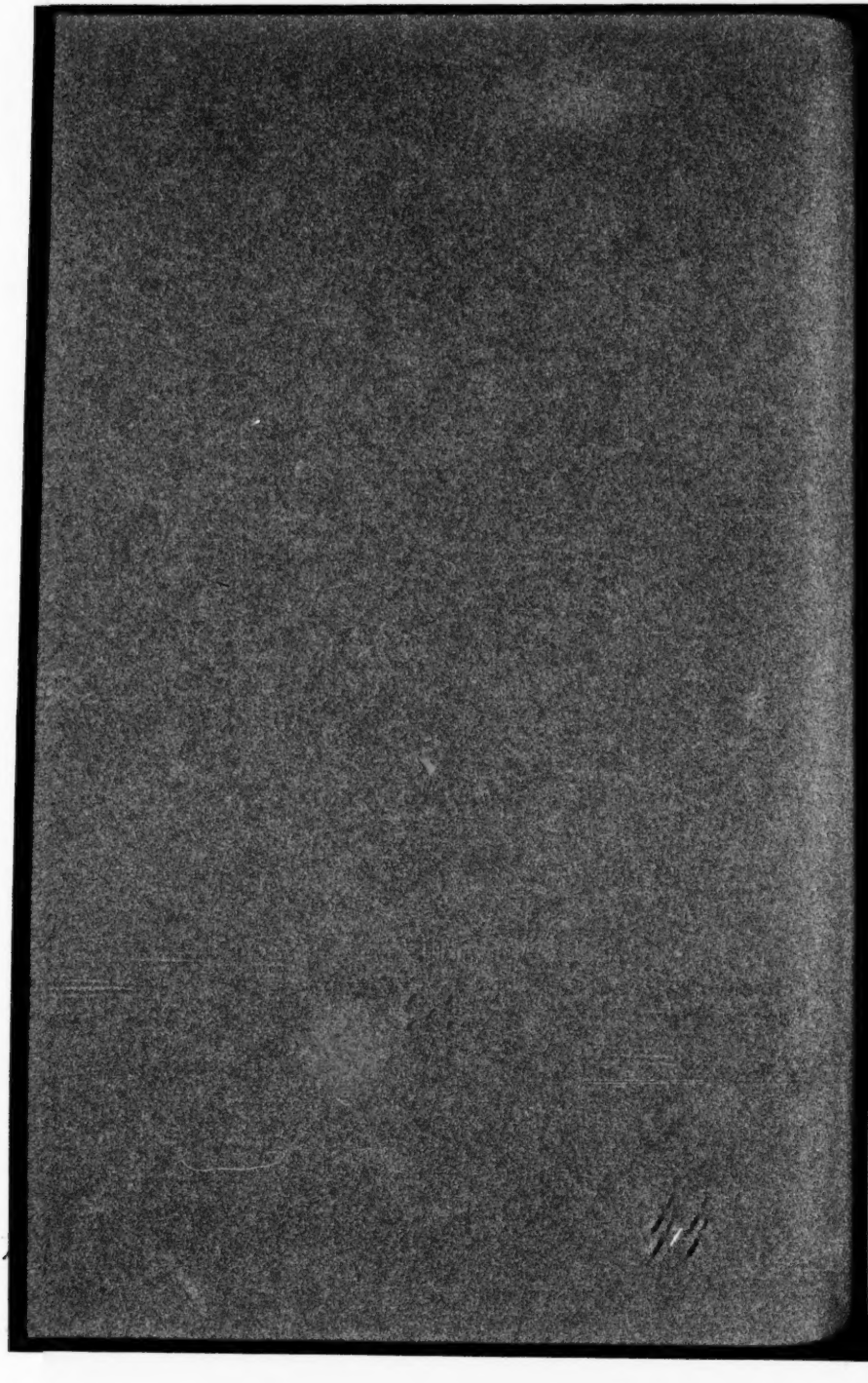

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is an ordinary suit for alleged patent infringement, in which the Court of Appeals for the Second Circuit held Korver patent No. 2,162,847 for a "Flash Lamp" to be invalid. The opinion of the Court of Appeals is at R.* 215 to 274 and is reported at 187 F. 2d 577. The opinion of the District Court, which held the patent valid, is at R. 6 to 30, and is reported at 81 F. Supp. 511.

Plaintiff, Hartford, holds legal title to the patent in suit, as assignee in trust of N. V. Philips Gloeilampenfabrieken, Eindhoven, Holland, the leading European

* The testimony was printed before the Court of Appeals in a "Joint Appendix", to which the proceedings in that Court have now been added. This volume is referred to in this brief as "R. ——." The exhibits are before this Court as physical exhibits, and some are reproduced in a "Joint Exhibit Book."

manufacturer of all types of lamps and the employer and assignee of Korver, the patentee. Plaintiff, Wabash, the flash lamp manufacturing subsidiary of Sylvania Electric Products, is exclusive licensee under the various Philips flash lamp patents in this country. Defendant, General Electric, manufactures and sells the alleged infringing shredded foil flash lamps; defendant, Ross, sells such lamps in the Eastern District of New York.

The only question involved in the petition is whether the action of the Court of Appeals in holding the Korver flash lamp patent to be invalid should be reviewed by this Court.*

The petition does not involve the Korver method patent No. 2,115,423, held not infringed by all of the judges below, nor does it involve any question concerning the District Court's procedure as to that patent, discussed at length by the Court of Appeals (Petition, p. 3).

The holding of invalidity with respect to the product patent, which is sought to be reviewed, does not present any unsettled or disputed question of law. There is no conflict in decision with any other circuit. The case presents no question of general interest or public importance, and there is no reason why this Court should grant certiorari. Furthermore, the decision below that the patent is invalid is entirely correct.

1. There is no reason why the writ should be granted

In substance, the only reason advanced in the petition as to why a writ should be granted in this case is the contention that the Court below required a standard of inven-

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* The Court of Appeals, having held the patent invalid, did not pass on the defense of non-infringement. Actually, the patent is not only invalid but also is not infringed by the respondents' products, which differ substantially from the product disclosed and claimed in the patent in suit in respects which are of the essence of the claimed invention.

tion which was too high. As to this contention, the petition states:

> "If it be true that Judge Hand or Judge Frank concluded therefrom [the recent decision in the *Supermarket* case, 340 U. S. 147] that patents are now to be sustained only in rare cases of outstanding invention, we submit the Court below misapprehended that decision and decided the question at bar in a way that is in conflict with applicable decisions of this Court." (Petition, pp. 9-10)

The difficulty with this argument and, in fact, with the whole petition, is that it poses a question which is in no way presented by the actual facts of the present case. Judge Hand made no reference to the *Supermarket* case or to any supposed change in the standard of invention required for patentability. He simply held that he and Judge Frank were "unable to discover any patentable invention" (R. 216) in the patent, in view of what the prior art taught. This holding was abundantly justified by the facts of the case.* As stated by Judge Hand, with the concurrence of Judge Frank,

> "The Ostermeier, Van Liempt and Crowley patents taught the art enough to defeat the claims of the product patent relied on. In the first, a metallic foil was used; in the second, a metallic wire; and in the third, metallic wool. The only thing that remained was to fill the entire bulb with the wire for, given that, the filling would normally be undulating, serpentine, and elastic." (R. 216)

In quoting from Judge Hand's opinion, petitioners omit a very significant portion, a portion which goes far to explain why Judge Hand properly held that the Korver

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* The pertinent facts as to what was old before Korver's alleged invention are documentary or stipulated. The dissenting opinion, and the District Court's opinion, simply failed to appreciate the significance of some of these undisputed facts and thus attributed to Korver things which he did not actually contribute.

product patent was invalid under any "standard of invention" which has ever been applied by the courts. As Judge Hand stated in his opinion, immediately following the portion quoted by the petitioners:

> "If there was any invention in either of the patents in suit, it was in the mode of blowing the wire into the bulb with a stream of controlled air."

This particular method and device for filling a bulb was the thing originally stressed in Korver's patent application and the thing with which substantially his entire patent description and drawings are concerned. All of the judges below agreed that General Electric did not use this method of filling a bulb, which was Korver's true contribution, if any, and petitioners do not here attack this unanimous holding.

The product patent which is here involved issued as a division of Korver's original application, which was entitled "Method and Device for Transporting Wires." The "divisional" patent, entitled "Flash Lamp," which is the patent before this Court, is in fact a patent solicitor's invention, a thing of words with little connection to Korver's actual contribution.* Even as to this flash lamp patent, which a patent solicitor's persistence finally obtained from the Patent Office, plaintiffs have had to construe the patent so broadly, in order to make the patent read on the accused General Electric shredded foil lamp, that the patent would cover any flash lamp uniformly filled with crumpled strand material.

This would make the patent read on flash lamps disclosed in prior patents, and the Court below correctly held the patent invalid, without any need to use, or to discuss, a "high standard of invention."

---

* Korver tried, but was unable to secure, any claims to the lamp in Germany where he filed his original application on which both of his United States patents were based.

2. The decision below was correct in holding the Korver product patent invalid

The patent here involved, Korver product patent No. 2,162,847, is for a particular kind of flash lamp used in photography, such lamps usually being called "photoflash" lamps. The earliest date claimed for Korver is May, 1934, the filing date of his German application.

(a) The patent in suit compared to the prior General Electric foil filled lamp

The first successful photoflash lamps were those produced under Ostermeier Patent No. 1,776,637 (Exhibit Book, p. 11). These Ostermeier lamps were put on the market in the United States by General Electric in 1930, four years before any activity by Korver.

These Ostermeier photoflash lamps consisted of a sealed lamp bulb containing oxygen gas and a loose filling of thin crumpled aluminum foil uniformly distributed throughout the bulb. When such a lamp (whether the combustible filling be of sheet foil, strips of foil, or wire) is connected to a source of electricity, a small filament in the lamp flashes its coating of a fulminating substance, igniting the metallic element and oxygen, thus producing a flash of the high intensity and short duration suitable for use in flash photography (Stipulation, Exhibit Book, p. 6).

The Korver patent (Exhibit Book, p. 7) shows a method and device whereby a long, continuous, thin alloy wire is internally strained and blown into a lamp bulb under tension in such a manner that when the wire is released in the bulb it assumes an undulated, coiled position, elastically pressed against the bulb walls. The claims call for a flash lamp containing "a mass of thin undulated wire," "elastically supported from the wall thereof," and "in substantially uniform spacial distribution."

(b) The flash lamp of the Korver patent and the accused shredded foil lamps are alike only in having their combustible material in strand form, and distributed throughout the bulb

The General Electric shredded foil photoflash lamps, which are the alleged infringement involved here, have, instead of Korver's undulated wire, a filling "consisting of a mass of crumpled shreds or narrow strips cut from a sheet of aluminum foil" (Stipulation, Exhibit Book, p. 1). This filling material, when examined under the microscope, is seen to have a highly irregular cross-sectional shape with burrs at the edges,* as seen in Figure 3 of the Rippl et al. patent at page 23 of the Exhibit Book.

Hundreds of such strips are used per lamp instead of one continuous wire, as in Korver; the material is pure aluminum, instead of the magnesium-aluminum alloy used by Wabash; instead of being undulated or coiled like the Korver wire, the General Electric shreds "form into a tangled mass of crumpled shreds bent in every conceivable direction at non-uniform intervals" (Stipulation, Exhibit Book, p. 4). In spite of the natural resemblance between any very fine strands of metal, when viewed with the naked eye, the difference between the Wabash coiled or undulated wire and the General Electric crumpled shreds can be seen quite clearly by comparing the enlarged photographs, defendants' exhibits P and Q (Exhibit Book, pp. 50 and 51). The regular coiling or "undulations" in the Wabash lamp shown in Exhibit Q is in striking contrast to the haphazard "hay" of the General Electric shreds, shown in Exhibit P.

Instead of being elastically pressed against the bulb like Korver's coiled spring-like wire, the shreds of foil are merely in contact with the bulb wall and do not bear elastically against it, as shown by comparing the photo-

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* This has the advantage of being easier to ignite than wire (R. 124). It is significant as to the existence of a real difference and advantage, that Wabash has itself now gone over to the use of shredded foil instead of wire (R. 66).

graphs at pages 52 and 53 of the Exhibit Book. The General Electric shreds are held in position in the finished lamp by being embedded in the lacquer coating on the inside of the bulb wall before the lacquer hardens (R. 129).

The substance of the matter is that Korver differed from the original General Electric Ostermeier foil lamp in using a filling of undulated magnesium-aluminum alloy wire instead of sheets of aluminum foil. The accused General Electric shredded foil lamps differ from the original General Electric Ostermeier lamp in using thin shreds or strips cut from thicker aluminum foil, instead of Ostermeier's thinner sheets. In so far as the Korver patented lamp and the accused General Electric lamp differ from the original Ostermeier lamp, they have diverged in different directions, and are alike only in using strand material instead of sheet material as the combustible filler.

(c) Korver was not the first inventor of a flash lamp using strand material as the combustible filling

Korver was not the first to suggest the use of strand material instead of sheet foil in a flash lamp, nor indeed was he the first to suggest the use of wire. The exact wire used by him and by Wabash in all of its wire filled lamps was invented prior to Korver by Van Liempt, another patentee.

At various times after the commercial introduction of flash lamps by General Electric in the form of its sheet foil lamp, the suggestion had been made that the combustible material in flash lamps be in the form of wire, strip, ribbon, and metallic wool, instead of foil, as we shall see in our discussion of the prior patents. If the combustible material could be made in such form, it could be thicker but still ignitable and thus a longer flash would be produced, and other advantages obtained. The trouble was that no practical way was then known of producing such materials of the thinness required for ignition, aside from the beaten foil then used in the General Electric lamps (R. 116, Exhibit Book, p. 45, col. 1, l. 40 to col. 2, l. 4).

This problem was solved in different ways: in one way by the Philips Company in Holland, which developed a new magnesium-aluminum alloy wire, and in a different way by General Electric, which developed new machines capable of cutting extremely thin strips from a sheet of aluminum sheet foil. Korver had nothing to do with either of these different and independent developments.

The first solution, in point of time, was by Van Liempt, a fellow-employee with Korver of the Philips Company. In April, 1934, just prior to Korver's application, Van Liempt filed his application which resulted in Patent No. 2,037,101, found at page 45 of the Exhibit Book. This patent describes the advantages of using wire instead of foil,* but points out (p. 1, col. 1, l. 53, to col. 2, l. 1) that:

> "To obtain aluminium wire which can be ignited it would be necessary to draw aluminium far below the diameter to which it has been practical to draw it * * *."

It then goes on to state that Van Liempt has discovered that certain magnesium-aluminum alloys, for example an alloy having 5% magnesium and 95% aluminum, can be, unlike pure aluminum, conveniently drawn cold into wire which is fine enough so as to be readily inflammable in a flash lamp (p. 1, col. 2, l. 53, to p. 2, col. 1, l. 2).

It was Van Liempt's discovery of this alloy wire which made possible the production of the Philips and Wabash lamps, and the Van Liempt magnesium-aluminum alloy has been used by Wabash in all of its wire filled lamps (R. 57).

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* The beaten foil, extremely thin so as to be ignitable, was difficult to handle, "requires careful manual operations" and its "relatively high price" made the lamps fairly expensive (Patent, p. 1, col. 1, ll. 32-39). If wire is used, it can be thicker than foil (Patent, p. 2, col. 1, ll. 43-48), and thus slower burning, and "such lamps can be made in smaller bulbs" than foil lamps "for the same or even a greater amount of actinic radiation" (Patent, p. 2, col. 2, ll. 52-55).

Thus it was another employee of the Philips Company, *not Korver,* who first developed a wire which could be used for flash lamps, and which was and is used by Wabash in all of its wire filled lamps. Van Liempt's patent shows that it was he, not Korver, who recognized that wire lamps would be cheaper, more uniform, smaller in size and capable of using thicker material (and therefore slower burning) than foil lamps. These were not discoveries of Korver's. Whatever advantages flow from the use of the wire form of combustible material in flash lamps redound to the credit of Van Liempt, and not to the Korver patent. Korver merely devised a machine to blow Van Liempt's wire, devised specifically for use in flash lamps, into the flash lamp bulb.

In finally securing the allowance of the Korver lamp claims over the Van Liempt patent, Korver's attorney relied upon the argument that Van Liempt's wire was wound into a clew (ball) supported in various ways by the stem, and was not shown as touching the bulb walls or substantially filling the "active portion" of the bulb (File wrapper, Def. Ex. I). This argument for distinguishing Korver from Van Liempt was based on the fact that the Van Liempt patent drawings show the combustible wire as not entirely filling the bulb or touching the bulb walls, as distinguished from being stuffed into the bulb in such a way as to occupy the entire space available. However, the Van Liempt patent indicates that if a sufficiently fine wire is used or if the bulb wall is lacquered to protect it, there is no need to keep the wire away from the bulb (Exhibit Book, p. 47, patent, p. 3, col. 2, ll. 7-17). The Wabash commercial wire filled lamps use the finer wire and the interior lacquer, just as Van Liempt suggested before Korver. Therefore they naturally have the Van Liempt wire distributed throughout the bulb, as was normal practice with combustible material in prior flash lamps.

(d) Korver was not first to have crumpled strand material uniformly distributed throughout the bulb

There was nothing new with Korver in having a lamp with the flash material distributed throughout the "active portion" of the bulb and supported by the bulb walls. This was the customary way of distributing the flash material in the bulb long prior to Korver.

The Ostermeier patent, referred to above, shows a lamp in which a filling of crumpled foil was distributed throughout the "active portion" of the bulb and was in contact with and supported by the bulb walls. The same is true of the lamps which General Electric manufactured commercially under that patent beginning in 1930, long before Korver's alleged invention (R. 104, 106-107; Standardizing Notice, Def. Ex. J).

Similar distribution throughout the bulb and support by the bulb walls is shown in the prior Nichols Patent No. 1,995,938 (Exhibit Book, p. 28), which states that wire can be used instead of foil, and the prior Kobayashi Patent No. 1,904,057 (Exhibit Book, p. 31), which says that the combustible material can be foil or metal ribbon.

Similarly, the prior Crowley British Patents Nos. 403,427 and 403,638 (Exhibit Book, pp. 33 and 40) show the use of metallic wool (a matted tangle of metallic strands), among other things, as a combustible material in a flash lamp, the drawings disclosing the material as uniformly distributed throughout the bulb (e.g., Exhibit Book, p. 43).

Nor do the references in the Korver claims to "elastic support" and "undulations" impart anything new or patentable. If the term "elastic support" is broad enough to include defendants' relatively inelastic shredded foil, it also includes the metallic wool of the prior Crowley patent. The Crowley bulb, filled with metallic wool, would have at least the same elastic support from the bulb wall as does the shredded foil lamp alleged to infringe Korver. Even the extremely thin foil of Ostermeier's original lamp

supported itself from the bulb walls, and if pressed down would return to place (R. 129).

As to "undulations", if the term "undulated wire" in the Korver patent were to be construed broadly enough to cover General Electric's crumpled shredded foil, then it would be completely anticipated by Crowley, because shredded foil is composed of thin strips of metal and is a form of metallic wool, both suggested earlier by Crowley for filling flash lamps.

Anything in common between the Korver lamp and the General Electric shredded foil lamps is found in the Crowley lamp filled with metallic wool. The Korver lamp patent cannot be valid over the prior art, including Crowley, and still be broad enough to cover the General Electric shredded foil lamps.

Furthermore, no claim of novelty for Korver can be based on the presence of undulations, because several patents, including Van Liempt, had suggested using wire filling before Korver, and the Korver patent admits at p. 1, col. 1, ll. 41-44, that:

> "As a rule, such thin wires inherently have sufficient internal strain to assume the desired curling upon entering the space, and to permanently retain such curling."

When Korver arrived upon the scene, others had already suggested wire as a flash material, and had disclosed the advantages that a wire lamp would have over a foil lamp. As soon as Van Liempt made available a wire which could be used as the combustible material in a flash lamp, the natural and obvious way to arrange such wire was just as Ostermeier had arranged his filling of foil, or Crowley his strips of metal or metallic wool, and this is just what Korver did; Korver merely loosely filled a bulb with Van Liempt's wire in accordance with the teachings of the prior art and let nature take its course.

There was no long search for Korver's alleged invention, which was obvious and followed immediately after Van Liempt's application disclosing his alloy wire.

The prior art shows that there was no invention in Korver's lamp, under any standard of invention. Indeed, if the claims are read broadly enough to cover the accused shredded foil lamps, they are directly anticipated by the Crowley lamp filled with metallic wool. The Court of Appeals was entirely correct in holding the patent invalid.

3. Commercial success of the Wabash lamp was not due to Korver

Much of plaintiffs' argument below and most of what they have to say in their petition here is based on the commercial success which the Wabash lamps had after their introduction on the market. The Wabash lamps were indeed successful, although the chart which petitioners reproduce in their petition gives an unfair picture of the situation, minimizing General Electric's sales during the period when it was selling three different types of lamps, by charting each of the different types separately. However, the important fact is that the commercial success of the Wabash lamp was due to factors in no way attributable to Korver.

When plaintiff Wabash entered the flash lamp field in 1936 (six years after General Electric had introduced flash lamps on a commercial basis), it did so as the exclusive American licensee of the well known Philips Company. This license included the Van Liempt patent which we have previously discussed, and another Van Liempt patent for a so-called "safety spot," together with two pending applications, of which the application for the Korver filling process was one (License, Plf. Ex. 1, Annex CC). The lamps which Wabash produced under this license and introduced under the name "Superflash" embodied the Van Liempt magnesium-aluminum "hydronalium" wire

which, as we have seen, first made possible the wire-filled lamp as a commercial product. These lamps had the longer burning period—a broader peak—which resulted from the use of thicker combustible material, and other advantages (such as the lack of shielding) which resulted from the use of wire instead of leaf foil. The principal points stressed in the effective Wabash advertising were the use of "patented hydronalium wire" of Van Liempt and Van Liempt's "patented safety spot" (Wabash advertisement, Def. Ex. C), neither of which had anything to do with the Korver patent in suit.

The Wabash lamp differed in almost all of its important specific features, such as the vital matters of oxygen pressure and primer material, from those suggested in the Korver patent (R. 60-62).

If credit were to be given to any new features other than Van Liempt's wire, it should be given to the use of higher oxygen pressure within the lamp, which permitted substantial reductions in the size of lamp required to produce the same illumination. This feature of higher pressure (and the resulting smaller size) was not contributed by Korver, who stressed the use of much lower pressures. Anderson, Wabash's chief engineer and plaintiffs' principal witness at the trial, testified that the increased pressure which began to be used sometime in 1938 was "quite an important development" (R. 62) and, Wabash, in seeking a patent on the use of such higher pressures, submitted Anderson's affidavit asserting that:

> "* * * the vast increase in sales of my assignee was primarily on account of the inventions covered by my [Anderson's] applications above identified." (R. 64)

Under the circumstances disclosed in the record, commercial success of the Wabash lamps furnishes no support whatever to the validity of the Korver product patent here involved.

Conclusion

In practical effect, in seeking to stretch the Korver patent to cover General Electric's shredded foil lamps, petitioners are contending that this patent gives them the right to exclude all others from making and selling flash lamps uniformly filled with crumpled strand material. The prior art shows that the Korver patent cannot be valid for any such scope, and the Court below correctly held it to be invalid.

This case does not present any unsettled questions of law or any questions of public importance. The opinion does not discuss the "standard of invention", and the patent involved is clearly invalid under even the lowest standard.

The petition for certiorari should be denied.

Respectfully submitted,

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July 3, 1951.

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM 1951

No. 114

WABASH CORPORATION and HARTFORD NATIONAL BANK & TRUST COMPANY (Trustee),
Petitioners,

v.

ROSS ELECTRIC CORPORATION and GENERAL ELECTRIC COMPANY,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THEODORE S. KENYON,
Counsel for Petitioner, WABASH CORPORATION.

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A brief reply is made necessary by the inaccuracies and omissions of Respondents' Brief. We will refer to but a representative few to illustrate the untenable nature of Respondents' position.

1. The reference to "Plaintiff, Wabash [as] the flash lamp manufacturing subsidiary of Sylvania Electric Products", (Br. p. 2) is misleading because it is true only of the period since January 1946 (Pltfs. Exh. 1, Item HH). What is significant is that prior to 1946 the business of making and selling the patented photoflash lamps had been built up

from scratch to unprecedented size by a small company, which ventured its capital on the merit of that product and against entrenched competition. It was only after the Korver lamp had pushed the respondents' earlier foil filled Ostermeier lamp off the market (A 231) that Sylvania paid Korver the solid tribute of acquiring the company that held the exclusive license under his invention.

2. Respondents are in error in asserting (footnote, p. 2) that the Court of Appeals "did not pass on the defense of non-infringement". On the contrary the opinion of the court states (per A. N. Hand, A 216) that the "facts are fully set forth in the opinion of Judge Chase. I differ with him only in so far as he would hold the product patent valid." In Judge Chase's opinion there is specific approval of the finding by the District Court that (A 235):

> "In every particular referred to in the claims, the structure of the accused lamps is the same as or the substantial equivalent of that described and claimed in the Korver product patent."

Plainly the Court of Appeals passed on the defense of non-infringement and rejected it.

3. The attempt to belittle the product patent as "a patent solicitor's invention" (Br. p. 4) is exactly contrary to fact. Claims for the product, the photoflash lamp, were included in the original application (Defts' Exh. GG, page 11). They were transferred to the divisional application only in response to the Examiner's requirement, in which he pointed out that the claims for the flash lamp were for a different invention from those for the means or method of filling it (id. p. 16).

4. In its argument on the merits, respondents' first reliance is on the commercially discarded Ostermeier foil filled lamp (p. 5). It is too late to argue that respondents have followed Ostermeier rather than Korver for the adjudication of both courts below has been to the contrary.

Its second reliance is on assertions of non-infringement (p. 6), which were unanimously rejected by the judges below.*

Respondents' third and main reliance is on vanLiempt, to whom respondents would attribute the first invention of wire fine enough for use in a flash lamp (Br. p. 9). But Shedlock had shown how to cut fine wire from thin sheets, just as respondents cut theirs, in his patent No. 888,124 of 1908 (Defts'. Exh. H, Tab 6). His filaments were of the same order of fineness as respondents (id, p. 1, ls. 72-84). Numerous patents and publications in the thirty years before vanLiempt spoke of using wire or ribbon for the filling of flash lamps (A 23, 31, and see statement in respondents' Ostermeier patent—Exh. Bk. p. 12, ls. 3-5). It was not fine wire the art was waiting for but the conception of uniformly distributing it throughout the entire bulb space in turns and loops supported elastically by the glass walls of the bulb itself. Before this unorthodox

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* Still laboring the argument that the filling in the accused lamps is not "elastically supported", respondents refer to the photographs at pages 52 and 53 of the Exhibit Book (Br. pp. 6-7). The photographs afford no fair comparison, for the Wabash lamp shown on page 53 had internal lacquer to which the loops of wire were bound to adhere as the jagged top of the lamp bulb was removed, while the G. E. lamp shown on page 52 was especially made without any inside lacquer (A 136). When the fillings were removed from standard commercial Wabash and G. E. lamps of corresponding size they were shown by *respondents'* expert to occupy the same overall space (A 175-6), contrary to these photographs. The elasticity of respondents' filling material, and its undulated, serpentine course, are clearly shown in Pltfs'. Exh. 38 (Exh. Bk. p. 27). All of the judges below agreed that in respondents' flash-lamps:

> "The mass of shreds is so light (generally less than a tenth of a gram) that the loops and tips in contact with the glass wall of the bulb are adequate to support the filling elastically and hold it in place, just as taught in the Korver patents." (A 235)

concept, which completely changed the practices of this industry, the bulb filling was supported by the ignition stem and was kept away from the bulb wall to avoid breakage on ignition. VanLiempt showed the very opposite of Korver's conception, as evidenced by his patent drawings and his warning against allowing the wire to touch the bulb walls (referred to at p. 9 of Respondents' brief). Instead of keeping his wire away from the bulb wall, Korver deliberately pressed it against the wall at countless tiny points, to obtain elastic support without danger of overheating or cracking the glass. The District Judge correctly held that vanLiempt "offers nothing in respect to the distribution of the content nor of the elastic support defined in the Korver claims" (A 21) and that his "filling material was neither serpentine, nor undulating" (A 36),—all of which was fully confirmed by Judge Chase (A 231-2). On top of that, indeed, by reason of that, the vanLiempt "lamp had poor lighting characteristics and was rejected commercially" (A 36). Respondents' assertion that it was van Liempt, not Korver, who solved the problem is in the teeth of the established facts.

Certainly neither the Nichols nor the Kobayashi patent (Br. p. 10) aided in the solution. So respondents are thrown back on Crowley (pp. 10-11) as was Judge A. N. Hand (A 216). If ever there was a case in which the very vagueness of a prior patent was utilized to destroy a later patent for an immensely successful invention, this is it. The Crowley patents are palpably and deliberately vague as to filling material because they have nothing to do with that; they are wholly concerned with the form and operation of the igniter and means to permit escape of the reaction gases.* They teach nothing as to the filling that was not long since known to the impotent art. As stated by Judge

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* Being foreign patents, they are not even clothed with the presumption of operativeness attributable to American prior art patents.

Chase (A 232) they mention metallic wool, among other filling materials, but come no closer to showing the Korver lamp. The absence of any disclosure as to the support or distribution of the filling is a fatal defect in Crowley, not a merit as respondents would have it.

It is beyond dispute that Korver was the first to bring together the elements of the claims in suit. It was his combination, not Ostermeier's, nor vanLiempt's, nor Crowley's, that revolutionized the art and made the foil lamp obsolete.

If the patent law is to be administered to promote the progress of the useful arts, this is a case that plainly merits review. Contrary to Respondents' conclusion (Br. p. 2), this case *does* present a question of general interest and great public importance.

Respectfully submitted,

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Dated: July 19, 1951.